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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 914

PHILLIP MICHAEL SCHEMEL, - - Petitioner,

versus

GENERAL MOTORS CORPORATION, - Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA,
EVANSVILLE DIVISION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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October Term, 1967

No. _____

PHILLIP MICHAEL SCHEMEL, - - *Petitioner,*

v.

GENERAL MOTORS CORPORATION, - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit, dated and entered in this case on July 17, 1967, with the petition for rehearing and rehearing en banc being denied on September 20, 1967.

CITATIONS TO OPINIONS BELOW.

The opinion of the United States District Court for the Southern District of Indiana, Evansville Division, is printed in Appendix A, and is reported at 261

F. Supp. 134. The opinion of the United States Court of Appeals for the Seventh Circuit together with the concurring and dissenting opinion is printed in Appendix B, and is reported only at 11 Ind. Dec. 1 (1967).

JURISDICTION.

The Judgment of the Court of Appeals was entered on July 17, 1967. On August 1, 1967, petitioner filed a timely petition for extension of time within which to file a petition for rehearing, and on August 2, 1967, the respondent filed an objection to petitioner's petition for extension of time. On August 5, 1967, petitioner filed a motion to amend his petition for extension of time, and on August 10, 1967, the Court of Appeals extended the time for filing petitioner's petition for rehearing to and including August 15, 1967. On August 15, 1967, petitioner filed a petition for rehearing and for rehearing en banc, and on August 21, 1967, respondent filed a petition for an extension of time within which to answer petitioner's said petition and the Court of Appeals granted respondent to and including September 11, 1967, within which to file its answer. On September 11, 1967, respondent filed its answer, and on September 20, 1967, the Court of Appeals denied both petitioner's petition for rehearing and for rehearing en banc.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

1. Whether under Indiana law the manufacturer of an automobile has the duty of exercising reasonable care in designing, manufacturing, selling, and distributing its automobiles so as to not create an unreasonable risk of serious personal injury to innocent bystanders who are to be endangered by the foreseeable use of its automobiles.

2. Whether petitioner's complaint states a claim for relief under Indiana law on the theory of negligence against the manufacturer of an automobile designed and advertised to be driven at excessive and unlawful rates of speed.

3. Whether petitioner's right to trial by jury as guaranteed by the Indiana Constitution was denied by the dismissal of his claim where it does not appear beyond a doubt that the petitioner cannot prove any set of facts in support of his claim which would entitle him to relief.

4. Whether petitioner's right to trial by jury as guaranteed by the Indiana Constitution was denied by the Court's determining factual issues and by failing to submit factual issues to a jury for determination.

STATEMENT OF THE CASE.

This action was brought to recover damages for the personal injuries sustained by the petitioner while riding as a passenger in an automobile which was struck from the rear by a 1960 Chevrolet Impala automobile manufactured by the respondent and operated at the

time of the collision by one Michael N. Bigham at a speed of approximately 115 m.p.h. Jurisdiction of the district court was invoked because of the diversity of citizenship.

Petitioner charges respondent with negligence in designing the Chevrolet automobile with a capacity for speeds far exceeding any legal or reasonable limit and inducing Bigham's use of that capacity by emphasizing speed in its advertising.

It is alleged that respondent knew that there was no useful purpose in manufacturing and selling automobiles that ordinary consumers could drive at such excessive and unlawful speeds when the roads and highways in the United States were not designed for and were not suitable for use by automobiles at speeds in excess of 100 m.p.h., when very few, if any, operators were capable of driving safely at speeds in excess of 100 m.p.h., and when the laws of each of the states contemplate maximum speeds of from 60 to 80 m.p.h.

Petitioner alleges that the respondent should have foreseen that its automobile would in fact be driven by someone at excessive and unlawful speeds to the risk of the public in general and in particular to innocent bystanders such as the petitioner, and that the respondent could and should have designed its automobile so that it could not travel at such excessive and unlawful speeds, but negligently failed to do so, and actually encouraged irresponsible persons to exceed lawful and reasonable speed limits by its advertising.

The respondent's motion to dismiss petitioner's action for failure to state a claim upon which relief

may be granted was sustained. The United States Court of Appeals for the Seventh Circuit affirmed with Judge Kiley vigorously dissenting. The petition for rehearing en banc was denied; however, Judges Schackenberg, Kiley, Swygert and Fairchild each voted to grant the petition for rehearing en banc.

REASONS FOR GRANTING THE WRIT.

1. The Majority Opinion of the Court of Appeals Erroneously Decides a Question of Great National Significance.

President Lyndon B. Johnson, in a White House Press Release on February 2, 1966, stated:

> "You and I know that the gravest problem before this nation—next to the war in Viet Nam—is the death and destruction, the shocking and senseless carnage, that strikes daily on our highways and that takes a higher and more terrible toll each year."

Judge Kiley's dissenting opinion quotes statistics published by the National Safety Council which indicate that "excess speed" is the leading factor in urban and rural fatal accidents and in rural injury causing accidents.

In a press release of August 13, 1967, William Haddon, Jr., Director of the National Highway Safety Agency, said:

> "We would like to see cars built so that they cannot exceed a certain speed, say, for example, 80 miles an hour, . . . Speed is important, particularly in certain kinds of accidents, the most

> common involves the teenager or college-age kids out joy riding, perhaps in a stolen car, often in a police chase . . . The speeds in these often get up to 100, 110, 120 even higher and frequently kill not only themselves but innocent parties."

This Court now has the opportunity of doing more to solve the problem of excessive speed than all of the traffic courts, police officers, and legislative bodies put together have been able to do to date because the long arm of the law now has its grip upon the source of the trouble. If the petitioner is given the opportunity to and is able to prove the allegations contained in his complaint, the respondent, and the other automobile manufacturers, will be forced to either stop designing their automobiles with such unreasonable speed capacity and emphasizing that speed capacity in their advertising, or pay damages to the people who can prove that such conduct proximately caused them damages. In either event, our nation will benefit because either the highways will become much safer or the victims will have solvent defendants to look to for compensation, not as an insurer, but as a wrongdoer, when the victim has *proven* the *wrongdoing* was a *proximate cause* of his damages.

The losses caused by unreasonably and unnecessarily dangerous automobiles should be placed on those who have created the risk and reaped the profits, rather than on innocent bystanders.

If the majority opinion of the Court of Appeals is not reversed, this Court will not only have missed the opportunity of taking the greatest step forward in

promoting automobile safety, but also this Court will have actually sanctioned the respondent's conduct and provided the automobile manufacturers with a legal precedent authorizing them to continue selling automobiles such as the respondent's "Corvette" which has had speedometers registering 160 m.p.h., and Ford's "Thunderbird" which has had speedometers registering 150 m.p.h. In fact, what would prevent the automobile manufacturers from building, advertising, and selling automobiles capable of traveling in excess of those speeds?

As excess speed not only causes so many accidents but also frequently kills or seriously injures innocent bystanders, there are very few cases where the decision has such national significance and is so deserving of consideration by this Court as this case. The fact that the Court of Appeals split with four judges voting for and four judges voting against granting the petition for rehearing en banc is an indication that this case deserves the consideration of this Court.

2. The Majority Opinion of the Court of Appeals Conflicts With Decisions of the Indiana Supreme and Appellate Courts.

The respondent's motion to dismiss and both of the lower Courts' opinions are based solely upon the premise that the respondent owed no duty to the petitioner. Whether a duty was owed by the respondent to the petitioner is determined by the substantive law of Indiana. *Erie R. Co.* v. *Thompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

(A) RESPONDENT'S DUTY WAS TO USE REASONABLE CARE.

Union Traction Company v. *Berry,* 188 Ind. 514, 121 N.E. 655 (1919), clearly defines the role of the court and jury so far as duty is concerned, and because the respondent is relying so heavily upon this decision, the following portion of the opinion, beginning at page 520 of the official report, is extensively quoted, to-wit:

> "The duty to exercise care for the safety of another arises as a matter of law out of some relation existing between the parties, and it is the province of the court to determine whether such a relation is shown as gives rise to such duty. In determining whether the relation shown gives rise to a duty to use care, the court decides a pure question of law. This question cannot be submitted to a jury. Where a duty to exercise care exists, it is always the same regardless of the nature of the relation out of which it arises. It cannot be said that the duty to use care which arises out of the relation of carrier and passenger differs in kind, character, or degree from the duty which arises out of the relation of master and servant, or out of any other relation which imposes the legal duty to use care.
>
> "In submitting the determination to a jury of a question of negligence, which is a mixed question of law and fact, the court is required to define the duty which the law imposes. This duty is defined by the law as 'due care,' 'ordinary care,' or 'reasonable care,' which terms are regarded by the courts as having the same significance. It is also the duty of the court to state the rule fixing

the standard of care which will measure up to the duty imposed by law. The court should then leave it to the jury to decide whether the acts and conduct of the defendant in respect to the matter before the court measures up to the standard of care fixed by the law. *In defining the duty and fixing the standard of care by which the jury is to measure the conduct of the defendant, the court does not consider the facts of the particular case.* The duty is the same under all relations, and the standard of care which will measure up to the duty in all cases is such care as a person of reasonable or ordinary prudence would exercise in view of all the conditions and circumstances as disclosed by the evidence in the particular case. *It is for the jury to consider the conditions and circumstances disclosed by the evidence in determining what action should have been taken or avoided, what precautions should have been employed, and what course of conduct should have been pursued in order to measure up to the duty of 'due care' which the law imposes.* In determining this fact the jury applies the standard furnished by the court, which is, What would a person of ordinary prudence have regarded as reasonably necessary or proper under the circumstances shown?" (Our emphasis)

Union Traction Company v. *Berry,* 188 Ind. 514, 121 N.E. 655 (1919), clearly holds that the only question for the court to decide with respect to duty is the relationship between the parties. Once the duty to use care is established, the court must leave to the jury the question of whether the conduct of the defendant measured up to reasonable care.

Belt, etc. Co. v. *McLain,* 58 Ind. App. 171, 106 N.E. 742 (1914), also emphasizes that duty arises from the relationship of the parties. At page 176 of the official report, the court said:

> "Where an act is alleged to have been negligently done or negligently omitted, the conditions and circumstances under which it was done or omitted are not necessary in a pleading for the reason that it is not the province of the court to judge from such conditions and circumstances whether ordinary care required the act to be done or omitted. That is the peculiar province of the jury. The duty to use care in favor of appellee being shown, it is sufficient to charge that the acts or omissions specified were negligently done or omitted. The general duty to use care in favor of the plaintiff which arises as a matter of law from the relation between the parties as shown by the complaint is broad enough and comprehensive enough to include every specific act that ordinary care requires in the discharge of such duty. When the general duty to use care is shown an allegation that ordinary care required the performance of a particular act is sufficient to bring such act within the scope of the general duty imposed by law."

On a motion to dismiss, the court should assume the truth of all the allegations in the complaint and the complaint should not be dismissed unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson,* 335 U.S. 41, 78 S. Ct. 99, 2 L. Ed.2d 80 (1957).

The petitioner's complaint alleges that an automobile that was negligently designed, manufactured, sold and distributed by the respondent was traveling at a speed of approximately 110 m.p.h. at the time it crashed into the rear-end of an automobile in which the petitioner was riding at a speed of approximately 55 m.p.h. The relationship of the parties is clear. The petitioner was an innocent bystander who was injured by one of the respondent's products.

If the Indiana law, as set forth in *Union Traction Company* v. *Berry,* 188 Ind. 514, 121 N.E. 655 (1919), and *Belt, etc. Co.* v. *McLain,* 58 Ind. App. 171, 106 N.E. 742 (1914), is followed, this court will not concern itself with the particular facts of this case other than to determine whether the relationship of the parties was such that the respondent was under a duty to use reasonable care to avoid injuring the petitioner.

The application of a different method for determining the manufacturer's duty by the Court of Appeals in this case creates a conflict between the result that could be expected in an Indiana court and the result obtained in this diversity proceeding.

(B) THE *EVANS* CASE IS NEITHER APPLICABLE NOR CORRECT.

The case of *Evans* v. *General Motors Corp.,* 359 F.2d 822 (7th Cir. 1966) *cert. den.* 385 U.S. 836 (1966), which the majority regarded as dispositive of this case, is clearly distinguishable from the case at bar for the reasons set out in the dissenting opinion of Judge Kiley.

In any event, the *Evans* case has been sharply criticized by the legal writers. In addition to the critical articles listed in footnote 6 of Judge Kiley's dissent, an article entitled, "Symptoms and Decisions" has appeared on page 29 of the June-July issue of Trial. Its author, Professor Jack L. Kroner of New York University Law School, in criticizing the *Evans* case, said:

> "The majority position that the court cannot define the liability of an automobile manufacturer so as to embrace the type of risk at issue in *Evans* is, of course, utterly untenable. Courts define duty in these cases every day, except of course where, as here, they fear the economic impact of their decisions and talk instead of 'legislative function'."

It should be noted that, except for his brief discussion of the negligent advertising, Judge Cummings gave no reason to concur with Judge Knoch except that he felt bound by the *Evans* case.

It is ironic that the majority in both the *Evans* case and the case at bar cited *Union Traction Co. of Indiana* v. *Berry,* 188 Ind. 514, 121 N.E. 655 (1919), as authority for their decision because that is the case which, if followed, would require the opposite result in both cases.

(C) LAWFULNESS OF USE IS NOT THE TEST.

The majority opinion of the Court of Appeals in its discussion of the Restatement of Torts, Second, has attached unwarranted significance to the words, "lawful use," as they appear in Section 395.

Section 395 must be read in conjunction with Sections 302, 302A and 302B as well as comment j to Section 395. It is true that Section 395 imposes liability for physical harm caused by the "lawful use" of a product, however, Sections 302, 302A, and 302B impose liability for injuries proximately caused by the original actor through the foreseeable actions of third persons, whether those actions are negligent, reckless or criminal.

Irrespective of what the Restatement says on this particular point, Indiana has always held that where harmful consequences are brought about by intervening and independent forces, the operation of which might have been reasonably foreseen, the original wrongdoer may be held liable regardless of whether the intervening act was a negligent or criminal act.

In *Binford* v. *Johnston,* 82 Ind. 426 (1882), the defendant negligently sold cartridges to two minors. The younger brother of one of the two minors obtained the cartridges and shot his brother. The seller was held liable. In *Smith* v. *Thomas, et al.,* 126 Ind. App. 59, 130 N.E.2d 85 (1955), the defendants, who furnished an automobile to a minor, were held liable to an innocent bystander whose truck was damaged as the result of the negligent operation of the automobile by the minor who was also unlawfully driving without a license.

The Indiana Appellate Court in *S. I. G. & E. Co.* v. *Caine,* 136 Ind. App. 379, 198 N.E.2d 14 (1964), held that the violation of a criminal statute by a person

wrongfully turning on gas does not relieve the gas company from liability to an innocent bystander when the company was also negligent. At page 388 of the official report, the court said:

> "The asserted claim by appellant of its insulation from liability merely because a third party turned on the gas through the use of the valve, permitting the said gas to flow through the meter and into the customer's side of the distribution system, falls on deaf ears in view of the guiding principles of law in Indiana, as established by our courts."

and at page 389, the court said:

> "There is the further doctrine of foreseeability upon which the jury was entitled to pass, and evidently did pass, favorable to appellee; that under all the facts and circumstances as shown by the evidence, the appellant could reasonably foresee that some third party might do exactly what was done, thus causing harm to others."

Innocent bystanders may recover, under Indiana law, from persons who sell liquor to minors or drunks despite the fact that the minor or drunk may harm them by some negligent or unlawful act. *Elder* v. *Fisher*, —— Ind. ——, 217 N.E.2d 847 (1966).

In *Northern Indiana Transit, Inc.* v. *Burk*, 228 Ind. 162, 176, 177, 89 N.E.2d 905 (1949), the Indiana Supreme Court quoted the Restatement at page 177 as authority for holding that it matters not whether the intervening independent act was a negligent or criminal

act, as long as it was reasonably foreseeable. The Indiana Appellate Court has recently followed the *Burk* case. *New York Cent. R. R.* v. *Cavinder*, ___ Ind. App. ___, 211 N.E.2d 502 (1965).

3. The Majority Opinion of the Court of Appeals Conflicts With the Principle of a Decision of the Supreme Court of the United States.

The scope of a manufacturer's duty was recently decided by this Court in *Parks* v. *Simpson Timber Co.*, 288 U.S. 459, 87 S. Ct. 2115, 18 L. Ed.2d 1319 (1967).

In that case, on the defendant's petition for rehearing en banc, the full Ninth Circuit vacated its original decision and held 5 to 4 that a manufacturer was under no duty to discover and prevent the unknown dangers to which his packaging might expose handlers of his product. *Simpson Lumber Co.* v. *Parks*, 369 F.2d 324 (9th Cir. 1966). At page 333, the minority opinion reads as follows:

> "A manufacturer's duty to exercise care extends to 'risks which are created in the course of uses of the chattel which the manufacturer *should reasonably anticipate.*' Restatement (Second), Torts, § 395, comment j. A manufacturer must foresee and guard against a given risk if it is one '*which a reasonable manufacturer would anticipate as likely enough to be taken into account*'; and it is ordinarily 'a question for the jury whether the maker should have anticipated it.' Harper & James, supra § 28.6, p. 1546. See also 1 Frumer & Friedman, supra, §§ 8.03, 8.05; Noel, supra, 71 Yale L. J. at 856-85 (1962)."

This court reversed thereby reinstating a verdict in favor of the plaintiff after the jury had been instructed that the manufacturer's duty was to use "reasonable care."

4. The Majority Opinion of the Court of Appeals Confuses Duty With Contributory Negligence.

(A) THE CASE OF *CAMPO* v. *SCOFIELD* IS NEITHER APPLICABLE NOR CORRECT.

The majority opinion relied on cases such as *Campo* v. *Scofield,* 301 N.Y. 468, 95 N.E.2d 802 (1950), and *Kahn* v. *Chrysler Corporation,* 221 F. Supp. 677 (D.C.S.D. Tex. 1963), in support of its argument that the sole duty of an automobile manufacturer to the public is to exercise care in the design and construction of its automobiles so that they will be reasonably fit for their intended use and free of latent dangers. In *Campo,* the court was faced with a situation where a remote user put his hand in a machine used to shear off the tops of onions. The court held that there is no liability on the part of a manufacturer if a person using an obviously dangerous machine is aware of such a risk and is contributorily negligent in assuming it. The court in that case, as in many other cases, loosely translated the issues of contributory negligence and assumption of risk into "duty language." As petitioner in the case now before the court was an innocent bystander and had no control whatsoever over the respondent's product, it is perfectly ridiculous to even consider whether the danger was latent. The *Campo* case is, therefore, not relevant, and should not be con-

sidered because the court was thinking in terms of a careless, ignorant, or incompetent person injuring himself through misuse. In *Kahn,* a child rode his bicycle into a sharp and protruding fin on the rear of a Dodge automobile. Although the court used "duty language," the following quotation at page 679, to-wit:

> ". . . should not be required to anticipate all the possible ways in which a person may injure himself by falling against an automobile, nor should they have a duty to protect against such possible injuries."

indicates that the basis of the decision was contributory negligence. Cases like these are of no value where an innocent bystander is the plaintiff despite such loose language about "duty."

In criticizing the *Campo* case, and the decisions that have followed it, probably the most outstanding treatise on products liability, Frumer & Friedman, Products Liability, § 7.02, at page 114, reads as follows:

> "It is submitted that these cases are unsound insofar as they deny recovery, as a matter of law, irrespective of whether the plaintiff appreciated the danger. A peril or danger may be patent but still not appreciated. Moreover, a manufacturer should incur responsibility for foreseeable injuries caused by dangers which were appreciated but momentarily forgotten, at least where it is feasible to install a safety device to eliminate the danger. Such questions should be decided by a jury, not by the court."

The same authors, in § 6.04, at page 103, state:

> "There, of course, may be an issue as to whether the danger or defect is 'obvious.' But even if it is an 'obvious' defect, so that the manufacturer is not liable to the user, by reason of the user's failure to prove his affirmative case or the user's assumption of risk or contributory negligence, depending upon the approach taken by the court, the manufacturer may still be liable for foreseeable injuries to third persons."

(B) REASONABLE FORESEEABILITY IS TEST EVEN FOR USERS.

In discussing abnormal or unintended use, Frumer & Friedman in § 15.01, page 351, say:

> "As previously discussed, the manufacturer is not liable for injuries resulting from abnormal or unintended use of his product, *if* such use was not reasonably foreseeable. The issue is one of foreseeability, and misuse may be foreseeable."

In *Spruill* v. *Boyle-Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962), the plaintiff's son died when he swallowed some furniture polish. The defendant, of course, contended that it did not manufacture furnish polish for the purpose of having it swallowed by children. The court settled the matter by stating at page 83:

> "Intended purpose is but a convenient adaptation of the basic test of (1) 'reasonable foreseeability' framed to more specifically fit the factual situations out of which arise questions of a manufacturer's liability for negligence . . . (He)

> (the manufacturer) must also be expected to anticipate the environment which is normal for the use of his product."

In *Lovejoy* v. *Minneapolis-Moline Power Implement Company,* 248 Minn. 319, 79 N.W.2d 688 (1956), the plaintiff was injured when the pulley on the power take-off disintegrated while he was driving a tractor downhill at a higher speed than that recommended by the manufacturer. Incidentally, the speed of the tractor was controlled by a variable speed governor of the "fly-ball" type, which regulates the amount of gasoline entering the engine so as to control its speed. Unfortunately, the governor was installed in such a manner that the tractor could be operated even though the governor had been removed. Naturally, the defendant contended that the plaintiff's operation of the tractor down a hill with the governor cut out was such an unusual, unexpected, and unanticipated act that the defendant was under no duty to guard against it. The trial court directed a verdict for the defendant, and the Appellate Court reversed stating:

> "Whether the speed involved here was such as should reasonably have been anticipated by defendant in designing and manufacturing the tractors are questions which should have been submitted to the jury."

(C) INNOCENT BYSTANDERS SHOULD BE PROTECTED.

In *Mitchell* v. *Miller, et al.,* 26 Conn. Supp. 142, 214 A.2d 694 (1965), a 1962 Buick which was manufactured by the defendant, General Motors Corporation, was parked upon the parking area of a country club overlooking the fairway of a golf course. The hydramatic gear shift mechanism slipped from a "Park" locking to a neural position thereby allowing the automobile to roll down and strike the plaintiff's decedent while he was playing golf upon the fairway. As in this case, the defendant demurred upon the basis that it owed no duty to an innocent bystander. In overruling the defendant's demurrer, the court stated:

> "A defective automobile manufactured as alleged in this complaint by the defendant, constitutes a road hazard upon the highway. See *Greely* v. *Cunningham,* 116 Conn. 515, 518. The likelihood of injury from its use exists not merely for the passengers therein, but for the pedestrian upon the highway. The public policy which protects the user and consumer should also protect the innocent bystander in the instant case. An innocent bystander, while playing golf, was killed by a car defectively manufactured insofar as the allegations of the complaint go by the defendant automobile corporation. There seems to be no sound public policy to bar trial upon the issues raised in the complaint."

In *Hills* v. *McGillvrey, et al.,* —— Ore. ——, 402 P.2d 722 (1965), an automobile parts supplier was

held liable for the wrongful death of a motorist who was killed when his automobile was struck from the rear by another because of brake failure due to the supplier's negligence in furnishing the wrong wheel bearing. Even though a mechanic negligently installed the wrong bearing, the court, in discussing duty, stated:

> "It was for the jury to decide whether or not harm to the public might be a foreseeable result of the conduct of Orchard Auto Parts. If it was reasonably foreseeable that some harm to the traveling public could result from the installation of the wrong part on an automobile, and if it was reasonably foreseeable that the mechanic might negligently install on an automobile, a part supplied him for such a purpose, then it would follow that there was a duty on the part of the supplier not to supply the mechanic the wrong part."

In *Connelly* v. *Hagi, et al.,* 24 Conn. Supp. 198, 188 A.2d 884 (1963), a gasoline station employee was permitted to recover against Chrysler Corporation for damages sustained when a defectively manufactured automobile jumped backwards and pinned him under the vehicle.

Innocent bystanders have recovered against the manufacturers of other defective chattels. In *Piercefield* v. *Remmington Arms Co.,* 375 Mich. 85, 133 N.W.2d 129 (1965), an innocent bystander was injured when the barrel of a shotgun being fired by another person exploded because of a defective shell which had been manufactured by the defendant. The court held that an innocent bystander should have a cause of

action against the manufacturer on the theory of breach of warranty as well as upon the theory of negligence and stated that "Michigan, for abundantly worthy reasons, has eliminated lack of privity as a defense to actions as at bar." In *Webb* v. *Zern, et al.,* 422 Pa. 424, 220 A.2d 853 (June 24, 1966), an innocent bystander was injured when a beer keg exploded. The Supreme Court of Pennsylvania held that the innocent bystander had a cause of action against the manufacturer of the beer keg, notwithstanding the absence of privity.

Elliott v. *General Motors Corporation,* 296 F.2d 125 (7 Cir. 1961), and *J. I. Case Co.* v. *Sandefur,* 245 Ind. 213, 197 N.E.2d 519 (1964), held that privity of contract was not essential under Indiana law to state a cause of action in negligence.

5. The Majority Opinion of the Court of Appeals Deprived Petitioner of His Constitutional Right to Trial by Jury.

Article 1, Section 12 of the Indiana Bill of Rights provides, in part, ". . . every man for injury done to him in his person, property, or reputation shall have remedy by due course of law," and Article 1, Section 20 provides, "In all civil cases, the right to trial by jury shall remain inviolate."

The Indiana courts have repeatedly held that because of the above constitutional right to trial by jury, "The law very zealously protects one against whom a motion for a directed verdict is addressed . . ." *Estes* v. *Anderson Oil Company,* 93 Ind. App. 365, 176 N.E. 560 (1931). In *Bradford* v. *Chism,* 134 Ind. App.

501, 186 N.E.2d 432 (1963), and *Coleman* v. *Mithick*, —— Ind. App. ——, 202 N.E.2d 577 (1964), the court interpreted the constitution as placing ". . . a heavy restraining hand upon the courts to deny the submission of a cause brought in good faith and based upon a situation involving far-reaching and serious consequences to the plaintiff."

The dismissal of the petitioner's complaint deprives him of the right to trial by jury just as a directed verdict. In the latter instance, at least the petitioner would have had an opportunity to introduce evidence in support of his claim.

6. The Possibility of Future Adequate Legislation Is Not Sufficient Reason to Deny Justice to Petitioner.

The majority opinion of the Court of Appeals quotes with approval the District Judge as saying in his memorandum opinion:

> "The problem of devising standards of safety for the manufacture of automobiles is a legislative problem."

Perhaps Congress should do more work in this field, however, the fact that neither Congress nor any of the state legislatures have made it a criminal offense to either sell automobiles capable of traveling 2 or 3 times the speed limit or to incite irresponsible persons to violate the speed laws by advertising should not cause an inference to be drawn that either Congress or any of the state legislatures believes that a person seriously injured as a proximate result of such wanton miscon-

duct should have no remedy against the original wrongdoer. Actually, the fact that no specific legislation has been enacted is an indication that our legislatures are confident that our courts can handle this problem by using the common law negligence rules which have worked well for years in Indiana, and Congress has recently indicated that it expects courts to discharge their duty and decide civil damage suits as they arise in that Section 108(c) of the National Traffic and Motor Vehicles Safety Act of 1966 (80 Stat. 718) states:

> "Compliance with any Federal motor vehicle safety standard issued under this title does not exempt any person from any liability under common law."

The suggestion that action should first be taken by legislation ignores the history of the common law and how it has grown.

CONCLUSION.

The Court of Appeals erred in its application of Indiana law by narrowing the manufacturer's duty to avoiding only hidden defects and latent or concealed dangers which is tantamount to saying there is no bystander protection.

This anomalous result can be avoided by following the Indiana law which spells out the established duty of reasonable care under the circumstances and then lets the jury decide whether the defendant breached this duty.

The Court's method of reasoning has changed a question of fact to one of law, and has deprived the petitioner of his constitutional right to a trial by jury.

Respectfully submitted,

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Princeton, Indiana,
Attorney for Petitioner.

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

PHILLIP MICHAEL SCHEMEL,
Plaintiff,
—vs—
GENERAL MOTORS CORPORATION,
Defendant.

Cause No. EV 66-C-58

MEMORANDUM OPINION.

This cause comes before the Court for ruling on the motion of the defendant, General Motors Corporation, to dismiss plaintiff's personal injuries action for failure to state a claim upon which relief may be granted. It has been fully briefed.

The novel theories presented by plaintiff's complaint are (1) that the defendant is under a duty to the motoring public, including plaintiff, to refrain from manufacturing and putting into the stream of commerce motor cars with a capacity for being operated at speeds in excess of one hundred miles per hour, and (2) that the defendant is under a duty to refrain from advertising its motor cars in such terms as to incite irresponsible and reckless drivers to drive at speeds in excess of such arbitrarily selected limit.

The facts pleaded, which we must assume to be correct for purposes of the motion, are that the automobile in which plaintiff was riding as a passenger, while being operated

on a public highway at a speed of approximately 55 miles per hour, was struck from the rear by a Chevrolet Impala automobile manufactured by defendant and being driven by one Michael N. Bigham at a speed of approximately 115 miles per hour. Plaintiff was severely and permanently injured as a proximate result of the collision. The defendant is alleged to have been negligent in designing, manufacturing, selling and distributing an automobile capable of being operated by an ordinary consumer, such as Bigham, at such a speed, in failing to install a governor making such a speed impossible in the hands of such a consumer; in designing, etc., the automobile "in such a manner as to release upon the general public a machine which was much more dangerous than was reasonable or necessary"; and by encouraging irresponsible persons, including Bigham, to drive in excess of 100 miles per hour by mass media advertising emphasizing and suggesting the super high speed capabilities of its vehicles.

The question as to whether a manufacturer of motor cars owes to motorists either or both of the duties alleged presents an issue of law for the Court. Evans v. General Motors Corporation, 7 Cir., 1966, 359 F.2d 822, cert. den. Oct. 10, 1966, 35 Law Week 3126, ____ U.S. ____, Union Traction Co. v. Berry, 1919, 188 Ind. 514, 121 N.E. 655. We conclude that neither duty exists, and hence grant defendant's motion to dismiss.

We consider the holding of the Seventh Circuit Court of Appeals in *Evans* to be dispositive of plaintiff's first contention that defendant had a duty to refrain from manufacturing and selling cars capable of speeds in excess of 100 miles per hour, unless equipped with a governor in the case of sales to the "ordinary consumer." In that case the contention was that General Motors was negligent in its design of a station wagon, in that the vehicle was designed with an "X" frame which did not have side frame rails to protect a driver involved in a side impact collision; the

driver in that case was involved in such a collision, and received fatal injuries therefrom, allegedly because the left side of the vehicle collapsed upon her as a result of such design. It is noteworthy that in *Evans* the injury occurred precisely in the manner which the manufacturer could have foreseen, yet the Court of Appeals affirmed the judgment of this Court dismissing the action, holding that there is no duty to make an automobile "more safe" when the danger to be avoided is obvious to all, so long as it is reasonably fit for its intended use.

A fortiori there could be no common law duty on a manufacturer to restrict its vehicles to a particular speed, since the possible harm to be anticipated (more accidents and more severe accidents) cannot be predicted to happen in any certain way or at any certain speed. Operating an automobile in excess of the maximum safe speed or posted limits, is illegal *per se,* in the absence of a justifiable excuse therefor. Simply because a certain amount of such illegal operation may be anticipated by the manufacturer does not impose a duty on him to make it impossible, any more than a manufacturer of guns or knives would have a duty to make impossible the wrongful use of its potentially lethal products.

The problem of devising standards of safety for the manufacture of automobiles is a legislative problem. Evans v. General Motors Corporation, *supra;* Camp v. Scofield, 1959, 301 N.Y. 468, 95 N.E. 2d 802. As plaintiff points out in his brief, the Committee on Commerce of the United States Senate held lengthy public hearings on the question of automobile safety in March and April, 1966, and considered, among other things, limitation of the designed maximum speed of automobiles. He omits to state, however, that the National Traffic and Motor Safety Act (P.L. 89-563), enacted by the recent Congress as a result of such hearings, does not attempt to regulate such designed maximum speed. Obviously, if regulation in this area is to

come—and we do not say it should not—it should come in the form of an act which would apply a uniform national standard to a highly centralized national industry, and not be hammered out, higgledy-piggledy, on a case to case basis with all of the disparity which would inevitably result.

As to plaintiff's contention regarding the defendant's alleged method of advertising, it is apparent that if it has the legal right to manufacture automobiles capable of attaining high speeds, it has the right to advertise its merchandise accordingly. Whatever else may be said about it, such advertising is at least truthful. As to the possible adverse effect of defendant's advertising on the driving habits of its customers, it seems to us that such a theory is altogether too speculative to support a legal cause of action.

Accordingly, plaintiff's action is dismissed, with prejudice, at plaintiff's costs.

DATED this 28th day of November, 1966.

(s) S. HUGH DILLIN,
Judge, United States District Court.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 16011 SEPTEMBER TERM, 1966 — APRIL SESSION, 1967

PHILIP MICHAEL SCHEMEL,
Plaintiff-Appellant,

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

JULY 17, 1967

Before, KNOCH, KILEY and CUMMINGS, *Circuit Judges.*

KNOCH, *Circuit Judge.* Plaintiff-appellant, Philip Michael Schemel, brought this suit in the United States District Court to recover damages for personal injuries sustained by him while riding as a passenger in an automobile which was struck from the rear by a 1960 Chevrolet Impala automobile manufactured by the defendant-appellee, General Motors Corporation, and operated at that time by one Michael N. Bigham who is not a party to this suit,* at a speed of about 115 miles per hour.

*Plaintiff has already collected damages from the insurer of Michael N. Bigham in exchange for a covenant not to sue.

The plaintiff alleged that the defendant knew or should have known that there was no useful purpose in designing an automobile which could be driven at excessive speed, that defendant should have foreseen that the automobile would in fact be driven by someone at excessive and unlawful speed to the risk of the public in general and in particular to innocent bystanders such as plaintiff, and yet the defendant negligently designed, manufactured, and sold an automobile capable of being driven at such dangerous speed.

The plaintiff also alleged that the defendant was further negligent in truthfully advertising the speed at which its automobile could be driven thereby encouraging irresponsible persons to exceed lawful and reasonable speed limits.

The defendant's motion to dismiss plaintiff's action for failure to state a claim on which relief might be granted was sustained, and this appeal followed.

Plaintiff contends that the defendant owed a duty to use reasonable care in designing, manufacturing, selling and distributing its automobiles to avoid injuring plaintiff, that plaintiff has charged negligent acts or omissions by the defendant, resulting in injury to him, and that it was therefore for a jury to decide whether the defendant had breached its duty to exercise due care in the conditions and circumtances disclosed by the evidence.

The plaintiff does not allege that there was some defect in the automobile which prevented its driver from operating it at a lesser speed or that any defect in its brakes or steering mechanism caused the collision.

We agree with the District Judge that this Court's opinion in *Evans* v. *General Motors Corp.*, 1966, 359 F. 2d 822, cert. den. 385 U. S. 836, is dispositive of the case before us. As we said there (at page 824) the nature of the duty which the manufacturer owes presents an issue of law for the Court. *Union Traction Co. of Indiana* v. *Berry*, 1919, 188 Ind. 514, 520-21, 121 N. E. 655, 657, 124 N. E. 737; *Kahn* v.

Chrysler Corp., D. C., S. D., Tex., 1963, 221 F. Supp. 677, 678; *Willis* v. *Chrysler Corporation, D.C., S.D., Tex.*, 1967, 264 F. Supp. 1010. We cannot accept the plaintiff's contention that once the Court determines that a relationship exists between the parties giving rise to some duty, the determination of the nature and extent of that duty becomes a question of fact for the jury.

The plaintiff invites our attention to §398 of the Restatement of Torts, Second:

> A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

It is the plaintiff's theory that any automobile which can be driven at speeds of 110 to 115 miles per hour on roads not designed for such speeds is dangerous for the use for which it is manufactured.

However, §398 is characterized by the accompanying comments as a special application of the rule in §395 which reads:

> A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its *lawful use* in a manner and for a purpose for which it is supplied. (our emphasis)

The automobile in question was not dangerous for the use for which it was manufactured by its lawful use in the manner and for the purpose for which it was supplied.

The manufacturer is not an insurer. His duty is to avoid hidden defects and latent or concealed dangers. See *Campo* v. *Scofield,* 1950, 301 N.Y. 468, 95 N. E. 2d 802, cited with approval in *J. I. Case Co.* v. *Sandefur,* 1964, 245 Ind. 213, 197 N.E. 2d 519, 523. He is not bound to anticipate and guard against grossly careless misuse of his product by reckless drivers. The dangers attendant on excessive and unlawful speed are neither latent nor concealed.

We are not convinced by the plaintiff's contention that Evans is not applicable. The plaintiff here, like the plaintiff in Evans, sought to impose on the automobile manufacturer a duty to design an automobile incapable of causing injury (or capable of minimizing injury) through foreseeable misuse for a purpose for which the automobile was never supplied.

As the District Judge said in his Memorandum Opinion:

> The problem of devising standards of safety for the manufacture of automobiles is a legislative problem.

We also hold that the defendant was under no duty in advertising its product to conceal the reserve power built into the machine, to avoid possible misuse of that power by a wantonly negligent driver.

We have carefully scrutinized the cases and other authorities cited by the plaintiff but find them of no avail to after our opinion that the judgment of the District Court must be affirmed.

AFFIRMED.

CUMMINGS, *Circuit Judge* (concurring). Feeling bound by this Court's recent opinion in *Evans* v. *General Motors Corp.,* 359 F.2d 822 (7th Cir. 1966), certiorari denied, 385

U.S. 836, I join in the affirmance. It is true that *Evans* does not dispose of the parts of the complaint attacking defendant's offensive advertising.* However, the complaint does not charge that defendant's advertising caused Michael Bigham to drive at a speed of 115 miles per hour, or even that Bigham read the reprehensible advertisements. Plaintiff's authorities simply do not support his theory of tort liability based on defendant's advertising methods. Cf. Restatement of the Law of Torts, Second, § 303. Therefore, reversal would not be justified on that ground.

KILEY, *Circuit Judge,* dissenting.

I respectfully dissent. In the first place, my view is that both the district court and this court violated the liberal spirit of federal rules of pleading by "pigeon-holing" plaintiff's complaint as though it were in two counts alleging separate claims for negligent design and negligent advertising. A fair reading of Schemel's complaint "so as to do substantial justice"[1] requires that we consider the allegations of unduly enticing advertising not only alone, but in conjunction with the charges of designing an automobile with a lawless[2] speed capacity. My opinion is that the district court erred in dismissing the complaint because it does not "appear beyond all doubt" that Schemel can prove no set of facts entitling him to relief against General Motors. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

The majority opinion assumes that Schemel can prove one set of facts relating solely to negligent design, holds that set insufficient to state a claim, and only then turns to the allegations of negligent advertising. In my view, this

*For a refreshing discussion of the need for reform in automobile advertising, see O'Connell, "Taming the Automobile", 58 Nw. U. L. Rev. 299, 358-370 (1963).

[1]FED. R. CIV. P. 8(f).

[2]The highest legal speed limit in 44 states is 70 miles per hour or less. Three states allow speeds up to 75 miles per hour, and one allows 80. Two states allow speeds that are "reasonable and proper."

reasoning is not adequate to uphold dismissal of a complaint under the *Conley* v. *Gibson* rule. I think Schemel's complaint states a claim against General Motors for its negligence in designing an automobile with a capacity for speed far exceeding any legal or reasonable limit and inducing Bigham's use of that capacity by emphasizing speed in its advertising.

The majority has decided in the case before us, as in *Evans* v. *General Motors Corp.*, 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966), that the question of the nature and *extent* of General Motors' duty is a question of law. Indiana law governs this diversity case, and under that law the nature of General Motors' duty *is* a question of law. *Union Traction Co.* v. *Berry*, 188 Ind. 514, 520-21, 121 N. E. 655, 657 (1919). I disagree, however, that under that decision the *extent* of the duty is one of law. As the Indiana Supreme Court held in *Union Traction:*

> Where a duty to exercise care exists, it is always the same, regardless of the nature of the relation out of which it arises. It cannot be said that the duty to use case which arises out of the relation of carrier and passenger differs in kind, character, or degree from the duty which arises out of the relation of master and servant, or out of any other relation which imposes the legal duty to use care.
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> * * *
>
> This duty is defined by the law as "due care," "ordinary care," or "reasonable care," which terms are reguarded by the courts as having the same significance. . . . In defining the duty and fixing the standard of care by which the jury is to measure the conduct of the defendant, the court does not consider the facts of the particular case. The duty is the same under all relations, and the standard of care which will measure up

> to the duty in all cases is such care as a person of reasonable or ordinary prudence would exercise in view of all the conditions and circumstances. . . .

121 N.E. at 657. This, of course, does not mean that beyond the extremes, where all reasonable men must agree, the question of violation of the duty is for the trier of fact. But the majority decision here does not purport to rest on the ground that Schemel's allegations are insufficient if proved to establish violation of a duty of due care, or that they disclose contributory negligence or assumption of risk as a matter of law.

The nature of General Motors' duty here is basically the same as that of any member of our society: the duty to act with reasonable care. Automobiles are intended to be used in an environment in which a traffic death occurs every eleven minutes and an injury every nineteen seconds,[3] and in which there are reckless, irresponsible drivers like Bigham. These are the traffic conditions under which the automobile will normally be used today and which must be considered in any meaningful application of the reasonable foreseeability rule. In my opinion, General Motors, as any other person, is chargeable with the duty of reasonably foreseeing the probable dangers of a design and the advertising it has chosen. RESTATEMENT (SECOND), TORTS, §§ 302, 302A, 302B (1965). Courts have increasingly liberalized the required scope of reasonable foresight in products liability cases,[4] including those involving automobiles. Manufacturers of automobiles have been required to anticipate the carelessness of operators and of non-user third persons

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[3] 16 DEPAUL L. REV. 261, 264 (1966).

[4] See, *e.g.*, *Tracy* v. *Finn Equip. Co.*, 310 F.2d 436 (6th Cir. 1962); *De Eugenio* v. *Allis Chalmers Mfg. Co.*, 210 F.2d 409 (3rd Cir. 1954); *Phillips* v. *Ogle Aluminum Furniture, Inc.*, 106 Cal. App. 2d 650, 235 P.2d 857 (4th Dist. Ct. App. 1951); *Mickle* v. *Blackman*, 6th Judicial Cir. Court, York County, S.C. (March 1963).

as a foreseeable risk caused by their negligent design. *Carpini* v. *Pittsburgh & Weirton Bus Co.*, 216 F.2d 404 (3rd Cir. 1954); *Ford Motor Co.* v. *Zahn*, 265 F.2d 729, 733-34 (8th Cir. 1959). There is no good reason for believing that Indiana would reject this trend.[5]

I think it is especially unwise for a diversity court to extend the *Evans* decision, another diversity case, in view of the lack of guidance this court has received from the highest court in Indiana, and in view of the sharp criticism[6] *Evans* has received that it is too restrictive and resists the current trend in products liability law by eliminating a manufacturer's duty to foresee and reasonably guard against common, if "unintended" dangers. See *Spruill* v. *Boyle-Midway, Inc.*, 308 F.2d 79, 83 (4th Cir. 1962); *Ford Motor Co.* v. *Zahn*, 265 F.2d 729 (8th Cir. 1959). "Indiana would unquestionably adopt the best reasoned and most intrinsically fair position, and presumably a determination by this court on such a basis would find approval with the Indiana Supreme Court." *Greeno* v. *Clark Equip. Co.*, 237 F. Supp. 427, 430 (N.D. Ind. 1965).

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[5]See Chief Judge Hastings' opinion in *Dagley* v. *Armstrong Rubber Co.*, 344 F.2d 245 (7th Cir. 1965), and Judge Eschbach's opinion in *Greeno* v. *Clark Equip. Co.*, 237 F. Supp. 427, 432 (N.D. Ind. 1965), where the previous Indiana requirement of privity in warranty actions was eliminated. *Cf. Elliott* v. *General Motors Corp.*, 296 F.2d 125 (7th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962), and *J. I. Case Co.* v. *Sandefur*, 245 Ind. 213, 197 N.E.2d 519 (1964), where the Indiana Supreme Court followed this court's lead in dispensing with the privity requirement in negligence actions.

[6]See 80 HARV. L. REV. 688, 689, 692 (1967) (result in *Evans* derives from "excessively narrow assumption" that purpose of automobiles does not include collisions; basic assumption that manufacturer's duty is narrower in design cases than in other negligence cases is an anachronism and illogical); 42 NOTRE DAME LAWYER 111 (1966); 55 ILL. B. J. 238 (1966); 16 DEPAUL L. REV. 261 (1966); 4 HOUSTON L. REV. 311 (1966); 1966 UTAH L. REV. 698; *but see* 52 CORNELL L.Q. 444 (1967) (*Evans* "strategically sound" in waiting for legislative action); *Cf. General Motors Corp.* v. *Muncy*, 367 F.2d 493 (5th Cir. 1966); *Krentz* v. *Union Carbide Corp.*, 365 F.2d 113 (6th Cir. 1966).

The majority's extension of the *Evans* "intended purpose" rule to determine the "extent" of General Motors' duty here is unwarranted because the issues under the complaints in *Evans* and in this case are clearly not the same. Whatever valid application the *Evans* intended purpose rule has to warranty and strict liability cases,[7] I think its use in this negligence case is wrong. In *Evans* the alleged negligent design was merely a passive cause[8] but here the alleged negligent design and advertising were active external cause of Schemel's injury.[9] The plaintiff's decedent in *Evans* was the user of defendant's car, whereas Schemel was an innocent bystander. And, most important, Bigham's use of the speed capacity here was not "unintended" by defendant, subjectively or objectively, within the meaning of *Evans*.

As to the first two of these differences, the collision alone was the active cause of the injury in *Evans*, whereas the speed capacity *and* Bigham's use of it are both active causes here. Even if collisions are "unintended" uses of automobiles and, under *Evans*, superseding causes, the colsion alleged in Schemel's complaint was the *result* of the use of the lawless speed capacity.

The meaning of "intended purpose" in *Evans* is not clear, but I doubt that a manufacturer's subjective state of mind is legally relevant in a negligence action, except that he is presumed to intend the natural and probable consequences of his conduct. If *Evans* means that something

[7]It has been suggested that an automobile manufacturer should be liable on warranty or strict tort liability theories for injuries caused during normal driving, but that a showing of negligence should be required where the alleged defect causes injury only because of a collision. 1966 UTAH L. REV. 698, 706.

[8]The *Evans* court noted that the plaintiff there did not allege that death or injury could have been prevented were it not for the use of the "X" frame. 359 F.2d at 824.

[9]A fair reading of Schemel's complaint discloses that the capacity for lawless speed caused the accident itself as well as increasing the severity of Schemel's injuries.

more than this is required, Schemel's allegations of unduly enticing advertising, encouraging Bigham to use the speed capacity, are sufficient to allege a use subjectively "intended" by General Motors. And General Motors' arguments in this court demonstrate that the lawless speed capacity itself was deliberately planned to provide "reserve power" for passing and to reduce "strain" on the engine during periods of sustained operation.[10] I think it is illogical and inequitable to rule that Bigham's use of the unlawful speed capacity was unintended, when General Motors has promoted the lawless speed capacity of his and other cars and allegedly encouraged him to use it.

If the *Evans* intended purpose rule refers to an objective standard—the normal use of a product—then I think its application here is equally erroneous. I agree with the court that the use of General Motors' automobile here raises some question of reasonable foreseeability in determining the existence of a duty here. But, as I have said above, I think General Motors is bound by a duty of reasonable care. Even using the conceptual "extent of duty" framework of the majority opinion, however, I think the majority fails to distinguish an "unintended" use from an unlawful use. It may be that General Motors did not specifically intend Bigham to drive his car at the alleged 110-115 miles per hour, but whatever benefit General Motors may claim from that is rebutted by its "reserve power" statement and advertising. In view of the injuries and death resulting from excessive speeds,[11] I cannot accept the

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[10]Defendant's brief 22-23.

[11]According to statistics published by the National Safety Council:

—10% of all fatal accidents involve a car traveling 70 miles per hour.

—13% of all fatal accidents in rural areas involve a car traveling over 70 miles per hour.

—33.3% of all fatal accidents involve excess speedy.

(Footnote continued on following page)

notion that the *unlawful* use here is an *abnormal* use as a matter of law[12] and that, under *Evans,* General Motors had no duty to anticipate it. In its brief, General Motors speaks of "common knowledge" that an automobile can be driven too fast. And General Motors must anticipate use of the lawless speed capacity because it could be liable for any defects causing accidents only at high speeds, where contributory negligence was not shown. See *Lovejoy* v. *Minneapolis-Moline Power Implement Co.,* 248 Minn. 319, 79 N.W.2d 688 (1956).

The essential questions raised by the unlawfulness of a use are contributory negligence, where the user is injured, and proximate cause and assumption of risk, where, as here, an innocent bystander is injured. By using the "intended purpose" rule to determine the question of duty here, I think the majority obscures the real issues: whether General Motors' conduct measured up to the standard of care required; whether that conduct was the proximate cause of Schemel's injuries; and whether Schemel assumed the patent risks of meeting drivers like Bigham on the highway. These questions can be matters for the court where no reasonable jury could find for the plaintiff, but I think the allegations here, if proved, are sufficient to support a verdict on each of these issues.

It is my view that under Indiana law, Schemel has sufficiently alleged that General Motors' conduct in designing and advertising the lawless speed capacity proximately

—20.6% of all injury causing accidents involve excess speed.
— 8.9% of all rural accidents involve two cars traveling in the same direction.

NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 46, 48, 53 (1966 ed.). "Excess speed" in these statistics includes driving too fast for conditions. It is the leading factor in urban and urban fatal accidents and in rural injury causing accidents. *Id.* at 48.

[12]In its brief General Motors states the issue in terms of unlawful use rather than intended use: "The question here is whether defendant's duty to plaintiff included the duty to protect plaintiff from an admitted unlawful use of its product."

caused plaintiff's injuries. The Indiana rule is that where an independent force could have been reasonably foreseen, the chain of causation is not broken. *New York Cent. R.R.* v. *Cavinder,* 211 N.E.2d 502 (Ind. App. Ct. 1965); *Northern Ind. Transit Inc.* v. *Burk,* 228 Ind. 162, 89 N.E.2d 905 (1949); *Smith* v. *Thomas,* 126 Ind. App. 59, 130 N.E.2d 85 (1955).

I think the majority's reliance on RESTATEMENT (SECOND), TORTS § 395 is misplaced because the phrase there denying recovery for unlawful use is plainly limited in context and by *comment j* to uses which the manufacturer "has no reason to expect" or which are "unusual and unforeseeable." Section 395 must also be read in conjunction with sections 302, 302A, and 302B which impose liability for injuries proximately caused by the original actor through the foreseeable actions of third persons, whether those actions are negligent, reckless or criminal. Under the test stated in *comment d* to section 302A, negligence of the original actor is determined by weighing the magnitude of the foreseeable risk against the utility of the original actor's conduct. Schemel's allegations raise a jury question on this point because of General Motors' admitted knowledge of the not uncommon use of speeds over 100 miles per hour, and advertising emphasizing those speeds, because of the severity and frequency of injuries and deaths resulting therefrom, because of General Motors' admitted knowledge of the propensity of some drivers to use such speeds and its alleged encouragement of Bigham to do so, and because of the alleged lack of social utility in designing and manufacturing an automobile capable of speeds up to 115 miles per hour.

The allegations that defendant failed to install a governor or other safety device and encouraged Bigham through its advertising to drive at speeds in excess of 100 miles per hour are sufficient to raise a question for the jury as to the reasonableness of defendant's design. Plaintiff

argues that weapons such as guns and knives have beneficial uses but that the lethal speed capacity of an automobile does not. General Motors counters by citing the need for "reserve power" for passing and to reduce engine strain. In effect the majority has taken this question of reasonable conduct from the jury by ruling on the extent of duty. I think this is a most inappropriate way of deciding a question where expert testimony is necessary.

To hold that General Motors has no duty to foresee an unlawful use of its automobiles because such a use is *patently* dangerous is to confuse the issue of duty with that of contributory negligence or assumption of risk. There can be no question that Schemel, alleged to have been driving lawfully at 55 miles per hour, was free of contributory negligence. I doubt that even "defensive driving," the ultimate in due care, could have saved Schemel's car from being "rear-ended" by Bigham's car, traveling at 110-115 miles per hour. And I think that this court is wrong in holding, in effect, that Schemel "assumed" the patent risk of Bigham's recklessness *as a matter of law.* The defense of assumption of risk is based upon the balance between the social utility of the plaintiff's conduct and the known risks involved. I think a jury is entitled to decide whether Schemel's conduct here is inherently unreasonable in view of the unnecessary risks created by excess speed by reckless drivers.

The majority holding has deprived Schemel of a jury trial on each of these issues, on which the allegations are, if proven, in my opinion sufficient to support a jury verdict. A jury composed most likely of automobile owners and drivers will fairly reflect social policy in deciding whether General Motors was negligent in designing and advertising the lawless speed capacity of its automobiles in today's traffic environment. Even if this case is to be decided on a question of law, the questions of sufficiency of evidence as to reasonableness and proximate cause are best considered

in an evidentiary context, rather than on a motion to dismiss.

We cannot presuppose that such a jury would disregard proof of General Motors that designing a slower automobile is impossible or impractical in view of today's technology and ambulance and police needs, or that the manufacture of its product with such a design is unreasonable when balanced against the occasional exposure of innocent persons to the use of the lawless speed capacity and the beneficial effects of "reserve power" for passing and to reduce engine strain. Nor can we presume that a jury would place the burden of the cost of plaintiff's injury unfairly upon General Motors rather than on Bigham alone or on plaintiff. Juries have been weighing the opinions of expert witnesses on all types of issues for years, and there is no reason why the decision of this court should here displace that of a jury, especially in view of the total absence of any sources of expert knowledge on the issues at the pleading stage. 42 NOTRE DAME LAWYER 111, 113 (1966).

The fact that setting safety standards for the automobile industry may preferably be left to Congress does not justify dismissing the Schemel complaint.[13] Congress has enacted the National Traffic and Motor Vehicle Safety Act of 1966.[14] True, as General Motors states, the Act does not establish maximum speed limits. Actually it merely authorizes the Secretary of Commerce "to establish by order appropriate Federal motor vehicle safety standards."[15]

---

[13]The district court in its opinion stated that if regulation in the area of maximum speed was to come "it should come in the form of an act which would apply a uniform national standard to a highly centralized national industry, and not be hammered out, higgledy-piggledy, on a case to case basis with all of the disparity which would inevitably result." *Schemel* v. *General Motors Corp.*, 261 F. Supp. 134, 136 (S.D. Ind. 1966). But the development of products liability law, as most common law, has been on a pure case to case basis.

[14]80 Stat. 718, 15 U.S.C.A. §§ 1381 *et seq.* (Supp. 1966).

[15]15 U.S.C.A. § 1392 (Supp. 1966).

The Act does not purport to create causes of action or to compensate victims, so that courts will still be called upon to decide liability for violation of the standards established. The courts should have an important place in supplementing the express purpose of the Act, "to reduce traffic accidents and death and injuries to persons resulting from traffic accidents."[16] The relatively small financial penalty for violation of the standards will hardly have the deterent effect that suits for large awards of damages should have. Manufacturers may choose however to risk or bear the financial cost of violation as a lesser evil than the cost of upgrading the safety features of its products. "In view of the clear purpose of the Act, to protect passengers from unreasonable risk of harm in automobile collisions," it is appropriate for courts to allow compensation to those injured by violations of the Act. 80 HARV. L. REV. 688, 694 (1967). And this court should not deny justice to Schemel individually because of the imminence of adoption of national standards promulgated in the interest of all.

I would hold that General Motors had the duty to foresee that if it designed its product with a speed capacity far exceeding any legal limit and emphasized that capacity in its advertising, recklessly inclined drivers would be encouraged to put that capacity to abnormal use and expose innocent persons like Schemel to the unreasonable risk that what happened would happen. And I would reverse the district court's judgment and remand Schemel's case for trial.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

---

[16] 15 U.S.C.A. § 1381 (Supp. 1966).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 914

PHILLIP MICHAEL SCHEMEL,
Petitioner,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court (Appendix A of Petition) is reported at 261 F. Supp. 134. The opinion of the Court of Appeals for the Seventh Circuit, and the concurring and dissenting opinions (Appendix B of Petition) are reported at 384 F. 2d 802.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

The sole question presented is whether the decision of the Court of Appeals conflicts with the law of the State of Indiana in holding, as a matter of law, that a manufacturer's legal duty does not require it to make a product that cannot be misused or to eliminate from truthful advertising descriptions of a product's capacities that might possibly incite the irresponsible to misuse it.

STATEMENT.

This was a diversity action brought by petitioner against the manufacturer of a 1960 Chevrolet. According to the complaint, petitioner was injured when the 1956 Plymouth in which he was riding as a passenger was struck in the rear by a 1960 Chevrolet then being driven at an unlawful speed of 115 miles per hour by a reckless and irresponsible third person.

Petitioner's claim against respondent was that because it knew of the reckless propensities of some drivers, it was negligent simply in having made and sold automobiles capable of being driven in excess of 100 miles per hour and in having advertised in mass media the power capabilities of its automobiles. The thrust of petitioner's claim is not that irresponsible people should be deprived of the privilege of using the highways, but rather, accepting the presence of irresponsible drivers on our roads, the courts should meet the problem of unpredictable and erratic drivers by imposing on the manufacturer the duty to protect third persons from irresponsible motorists, a subsidiary aspect of that duty requiring the manufacturer to refrain from advertising its automobiles in terms that might conceivably inspire the less stable members of society to use them dangerously.

The District Court dismissed petitioner's complaint for failure to state a claim against respondent upon which relief could be granted under Indiana law. The Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court.

SUMMARY OF ARGUMENT.

Repeatedly throughout the petition, it is incorrectly asserted that the courts below held that under Indiana law innocent bystanders have no protection against defectively made products. This is a complete distortion of the issue. Respondent conceded and the courts below recognized that under Indiana law respondent was under a duty to make its automobiles reasonably fit for their purpose and free from latent hazards or concealed dangers. Respondent's only contention was that this duty did not require it to protect against the obvious dangers to both users and bystanders of traveling at excessive speeds by limiting the speed capacity of its automobiles. The courts below agreed.

Petitioner's complaint is predicated on notions of a manufacturer's duty that are not recognized under the common law of Indiana or, for that matter, under the law of any other state. To sustain petitioner's position, a court would be required to embrace the general proposition that all manufacturers are under a duty to make products that are not subject to any recognized injurious misuse and to edit truthful advertising to avoid saying anything that might induce such misuse by erratic and irresponsible people.

The decision below is clearly correct and there is no need for this Court to review it. Under Indiana law, as well as the law generally, an automobile manufacturer like any other manufacturer must make his product reasonably fit for the *purpose* for which it is made and used and free

from hidden or concealed dangers; he is responsible for harm *caused* by his failure to do so. But there is no duty on an automobile manufacturer, or any other producer of goods in our society, to make a product that is completely "safe" from misuse. Nor is there any precedent or valid reason on which to construct a duty to excise truthful advertising of all material that conceivably might incite irresponsible people to make abusive use of a product.

Petitioner is obviously well aware that this Court seldom concerns itself with diversity actions such as this involving nothing more than the application of state law by a tribunal deemed to be an expert in the matter. In a desperate effort to entice this Court into reviewing such a decision, petitioner has proceeded to conjure up a variety of allegedly "important" questions that this case does not present. When this excelsior is removed, the fragile core of petitioner's attack on the determination under Indiana law of the duty question by the courts below is seen to consist of conclusory assertions and inapposite cases, compelling the conclusion that petitioner's complaint was, as held by the courts below, properly dismissed under that State's law.

ARGUMENT.

THE COURT BELOW CORRECTLY APPLIED INDIANA LAW IN DETERMINING, AS A MATTER OF LAW, THAT THE DUTY OF A MANUFACTURER DOES NOT ENCOMPASS THE DUTIES SOUGHT TO BE IMPOSED BY PETITIONER IN THIS CASE.

The court below decided that under Indiana law the nature and extent of the duty which the manufacturer owes presents an issue of law for the court, and that the law of Indiana does not recognize the duties which appellant seeks to impose on the manufacturer in this case, that is, a duty to design a product incapable of being misused or to refrain from advertising its product in such terms as might possibly incite an irresponsible person to misuse the product. This decision is clearly correct.

A. Duty Is Not a Fact Question Under Indiana Law.

According to petitioner, under Indiana law, the sole function of the court in a common law negligence action is to determine whether the defendant, by virtue of some relationship to the plaintiff, owes him a duty of due care. If so, it is then for the jury to determine whether the defendant was obligated to do or refrain from doing the specific thing complained of by the plaintiff (Petition, pp. 8-9). The invalidity of this is evident. Since petitioner further contends that it is the accident itself which gives rise to the necessary relationship (Petition, p. 11), in any accident case in which the plaintiff pleads that he was injured there is nothing left for the court to do but to send the case to the jury. In short, every injured plaintiff is necessarily

entitled to a jury trial. This position was specifically rejected by the court below:

> "We cannot accept the plaintiff's contention that once the Court determines that a relationship exists between the parties giving rise to some duty, the determination of the nature and extent of that duty becomes a question of fact for the jury." (384 F. 2d 802, at 804.)

So, in *Strickler* v. *Sloan, et al.* (1957), 127 Ind. App. 370, 141 N. E. 2d 863, the complaint alleged breach of a duty to install an additional safeguard. The trial court sustained a demurrer to the complaint and the Indiana Appellate Court affirmed, stating:

> "After a careful study of the authorities submitted by the appellant we concur that they are not in support of their contention and we are of the opinion that the *appellant's amended complaint is demurrable for insufficient facts because a manufacturer is not negligent for not installing a guard over open trash rollers on a cornpicker. . . .*
>
> "We cannot agree with appellant that the issues raised by the demurrer must be determined only by evidence.". (127 Ind. App. at 383, 386, 141 N. E. 2d at 870, 872.) (Emphasis added.)

Thus, even though the relationship between the parties in that case (manufacturer-user) was such that the manufacturer was under a duty to use reasonable care to avoid injuring the plaintiff, the Indiana Appellate Court nevertheless held, as a matter of law, that the manufacturer had no duty to protect the plaintiff from the injury he had sustained and there was nothing for a jury to decide.

The law question for the court in a negligence action, therefore, is not simply to determine abstractly whether the defendant owed the plaintiff some duty. The question of law also involves the particularized standard of conduct required in the situation at issue:

> "*It is for the court to determine* whether the plaintiff's interest which has suffered is protected by law *and whether the interest is protected against the 'particular hazard encountered.'*" *Swanson* v. *Slagal* (1937), 212 Ind. 394, 413, 8 N. E. 993, 1001. (Emphasis added.)

The statements quoted by petitioner from *Union Traction Co.* v. *Berry* (1919), 188 Ind. 514, 121 N. E. 655, and *Belt, etc. R. Co.* v. *McLain* (1914), 58 Ind. App. 171, 106 N. E. 742 (Petition, pp. 8-10), do not establish or even suggest that Indiana follows a novel practice of dividing the duty question between judge and jury, letting the judge determine the existence of "some" duty and then letting the jury determine the nature and extent of the duty. Nor is there support elsewhere for such a role. See *Kahn* v. *Chrysler Corporation* (D. C. S. D. Tex. 1963), 221 F. Supp. 677, 678:

> "However, who is to determine if a duty exists? Is this a matter of law or a disputed question of fact itself. Certainly there is disagreement in the instant case over whether or not the defendant had a duty to so design his vehicle that an accident like that under consideration could not happen. The very essence of plaintiff's complaint is that the defendant owed to the plaintiff a duty to manufacture an automobile with which it was safe to collide. But this is not sufficient to constitute a disputed fact issue, for this is a question of law to be determined by the court. *Whether or not a legal duty exists* on a given state of facts so as to give rise to actionable negligence on breach thereof, *as well as the nature and extent of the duty,* if any, is always essentially *a question of law.*" (Emphasis added.)

B. The Duty of a Manufacturer Under Indiana Law Does Not Require It to Guard Against Obvious Dangers.

Although at one point acknowledging that the court below held that the duty of a manufacturer was two-fold, to make products that are "reasonably fit for their intended use *and* free of latent dangers" (Petition, p. 16; emphasis supplied), petitioner concludes with a dramatic but demonstrably distorted characterization of the opinion below as having narrowed the manufacturer's duty by limiting it to avoiding only hidden defects and latent or concealed dangers (Petition, p. 24). The court below held, correctly under Indiana law, that since there was no allegation that the automobile in question was dangerous in its lawful use nor that its potential for harm was either latent or concealed, petitioner had failed to state a claim on which relief could be granted under Indiana law (384 F. 2d 802, at 804-5).

The court below relied on *Campo* v. *Scofield* (1950), 301 N. Y. 468, 95 N. E. 2d 802, approved by the Indiana Supreme Court in its most recent consideration of a manufacturer's duty, *J. I. Case Co.* v. *Sandefur* (1964), 245 Ind. 213, 220-23, 197 N. E. 2d 519, 523. The disagreement of the plaintiff-oriented text by *Frumer & Friedman, Products Liability,* § 7.02, p. 114, quoted by petitioner, or petitioner himself with the philosophy of the *Campo* decision (Petition, pp. 16-18) is beside the point. In applying the law of Indiana, the court below took the latest relevant opinion of the Indiana Supreme Court as its guide, and that opinion, in turn, showed Indiana's agreement with *Campo:*

> "Just as the manufacturer is under no obligation in order to guard against injury resulting from deterioration, to furnish a machine that will not wear out, . . . so he is under no duty to guard against injury from a patent peril or from a source manifestly dan-

> gerous . . . In other words, the manufacturer is under no duty to render a machine or other article 'more' safe—as long as the danger to be avoided is obvious and patent to all.
>
> * * * * * *
>
> "* * * Professor Bohlen in his work on Torts, after noting 'the impolicy of requiring the manufacturer to make so perfect a machine as to be incapable of injurious misuse', goes on to say (op. cit., p. 126): 'As to this there can be no two opinions . . . The manufacturer cannot be required to contemplate a misuse by any careless, ignorant, or incompetent person into whose hands the machine may come; injury through the medium of such an agency is neither a probable nor natural result of anything done or left undone by the maker.'' (95 N. E. 2d at 804, 805.)

The *Campo* case was also followed by the Indiana Appellate Court in *Strickler* v. *Sloan, et al.* (1957), 127 Ind. App. 370, 141 N. E. 2d 863, discussed above.

The Indiana courts' endorsement of *Campo* aligns Indiana with all those jurisdictions which hold that, in the absence of some hidden or concealed danger, a product which is reasonably fit for its intended purpose fulfills the manufacturer's duty, even though the article can be used irresponsibly to cause harm.

Here, there is no contention that the product in question did not function for the purposes for which automobiles are generally used nor does the petitioner complain about any hazard that was latent or concealed. Therefore, under the law of the State of Indiana, the complaint lacked any allegation that the manufacturer had violated its recognized duties—to make a product reasonably fit for its intended purpose and free from any latent or concealed hazards.

Petitioner does not quarrel with the conclusion of the court below that the dangers from excessive speed "are

neither latent nor concealed." (384 F. 2d 802, at 805.) He argues only that this is irrelevant because he was not a user of the automobile, but an innocent bystander:

> "As petitioner in the case now before the court was an innocent bystander and had no control whatsoever over the respondent's product, it is perfectly ridiculous to even consider whether the danger was latent. The *Campo* case is, therefore, not relevant, and should not be considered because the court was thinking in terms of a careless, ignorant, or incompetent person injuring himself through misuse." (Petition, pp. 16-17.)

In effect petitioner is saying that a manufacturer must make a safer product for an innocent bystander than he must make for a user, which is absurd on its face. Petitioner cites no authority whatever for this proposition. The cases cited, at pages 18-22 of the petition, in which innocent bystanders were permitted to recover, all involved products with hidden or concealed defects. None of these cases contains even the slightest suggestion that a manufacturer's duty to an innocent bystander is any different than its duty to a user; and at least one—*Mitchell* v. *Miller, et al.* (1965), 26 Conn. Supp. 142, 214 A. 2d 694 (Petition, p. 20) indicates the exact opposite with the statement:

> "The public policy which protects the user and consumer should also protect the innocent bystander . . ." (214 A. 2d at 699.)

C. The Manufacturer's Duty Is Not Equated to What He Can Foresee.

The manufacturer's duty does not, as petitioner claims, extend to dangers arising from any use of the product, so long as such use is foreseeable (Petition, pp. 18-19). This position erroneously equates the test for determining a legal duty with what is foreseeable:

> "It is frequently said that if the defendant as an

> ordinarily prudent person foresaw or should have foreseen some harm to the victim or other person so situated, defendant was under a duty to exercise reasonable care to avoid such harm. This is a valuable formula for submitting the issue in violation of duty in a negligence case to a jury, but it is not an adequate or reliable formula for the judge in determining the scope or extent of the defendant's duty. The determination of the issue of duty and whether it includes the particular risk imposed on the victim ultimately rests upon broad policies which underlie the law." (Green, "Duties, Risks, Causation Doctrines" (1962), 41 Tex. L. Rev. 42, at 45.)

In short, a danger must be foreseeable to a manufacturer before he has a duty to take action, but the reverse is not true. He is not required to take action with respect to all he can foresee—specifically, he is not required to guard against all dangers arising from a misuse of his product which are obvious to all. The two cases cited by petitioner in support of this argument are not in point. Both involved products with *concealed* dangers.

In *Spruill* v. *Boyle-Midway, Inc.* (4 Cir. 1962), 308 F. 2d 79 (Petition, p. 18), the product, a furniture polish, was sold without an adequate warning on its label of its deadly poisonous characteristics. And in *Lovejoy* v. *Minneapolis-Moline Power Implement Company* (1956), 248 Minn. 319, 79 N. W. 2d 688, a tractor was equipped with a pulley which disintegrated when driven at a faster speed than recommended by the manufacturer. Again, the manufacturer had not warned the user of the danger and it was not apparent.

Likewise, the petitioner cites this Court's decision in *Parks* v. *Simpson Timber Co.* (1967), 388 U. S. 459, as definitive of the scope of a manufacturer's duty (Petition, p. 15). His claim is that the decision below conflicts with *Parks*. This obviously is not so. *Parks* was a "concealed

danger'' case, involving Oregon law, which held only that the correct standard of due care is objective rather than subjective. In short, it is not necessary that a manufacturer know that its product might inflict injury on plaintiffs to whom a duty was owed; it was enough that a reasonably prudent manufacturer would have so known.

The case at bar is not a concealed danger case. There is no allegation of any failure to warn. In any event, all *Spruill, Lovejoy* and, in effect, *Parks,* say is that, where the danger is latent or unexpected, the manufacturer is required to give warning that the product may be dangerous if used in a certain way; they do not hold that the manufacturer is liable simply by virtue of having built the product. In this case, if injury had resulted because the automobile in question had disintegrated (*i.e.,* because it was unfit to be driven 115 miles per hour), and the manufacturer had failed to warn of this characteristic, obviously we would have an entirely different claim, one to which these cases might be applicable.

D. Petitioner Confuses Duty With Proximate Cause.

Petitioner also argues that the court below was incorrect in adopting the *Restatement* position that the duty of a manufacturer is limited to guarding against dangers arising from a lawful use of his product. Essentially his argument is that the Restatement was misinterpreted and, in any case, differs from the Indiana law. Petitioner concedes, as he must, that Section 395 of the *Restatement of Torts, Second,* limits the manufacturer's liability to physical harm caused by the ''lawful use'' of his product (Petition, p. 13). But he argues that this doesn't mean what it says, because the *Restatement* elsewhere says (Sections 302, 302A and 302B) that a defendant's negligent act which causes an injury will not be excused by an intervening negligent act of another which contributes to the injury,

if such intervening act was reasonably foreseeable; and he cites numerous cases which so hold. (Petition, pp. 12-15.)

This, however, is confusing causation with duty, which is begging the question. The court below did not hold that the recklessness of the driver of the automobile in question was an independent, intervening cause which excused a breach of duty by respondent. It held, and properly so, that respondent had breached no duty owed to petitioner in failing to anticipate and guard against the obvious danger arising from a driver's reckless operation of the automobile.

The Indiana cases which petitioner cites in support of his position are obviously inapposite, because of facts which he fails to mention in his petition. One involved the sale of cartridges to minors in violation of a criminal statute, (*Binford* v. *Johnson* (1882), 82 Ind. 426); one the entrustment of an automobile to an unlicensed minor in violation of a criminal statute, (*Smith* v. *Thomas* (1955), 126 Ind. App. 59, 130 N. E. 2d 85); and one holds that a person selling liquor to minors or drunks in violation of a criminal statute may be held liable for resulting harm, (*Elder* v. *Fisher* (1966), ... Ind. ....., 217 N. E. 2d 847). In the absence of any contention that respondent sold its product to a minor or a drunk in violation of a statute, it is difficult to see what support petitioner finds in these cases.

In a case in which petitioner is contending for the recognition of a duty to protect him against risks created by the foreseeable misconduct of others, cases such as *S. I. G. & E. Co.* v. *Caine* (1964), 136 Ind. App. 379, 198 N. E. 2d 14; *Northern Indiana Transit, Inc.* v. *Burk* (1949), 228 Ind. 162, 176, 177, 89 N. E. 2d 905; and *New York Cent. R. R.* v. *Cavinder* (1965), ... Ind. App. ....., 211 N. E. 2d 502 (Petition, pp. 13-15), are likewise irrelevant. These cases hold only that a party whose *initial* negligence combines

with the subsequent, foreseeable negligence of another party, is not thereby relieved of the consequences of his negligence but can be held jointly liable with the other negligent party. The negligence with which the original actor was charged in those cases was its own and *not* simply its failure to anticipate and protect against the foreseeable creation of danger by the subsequent actor.

E. The Reliance of the Court Below on Evans v. General Motors Corp. (7 Cir. 1966), 359 F. 2d 822, Cert. Den. 385 U. S. 836, Was Proper.

Petitioner contends that *Evans* v. *General Motors Corporation* (7 Cir. 1966), 359 F. 2d 822, *cert. den.* 385 U. S. 836, which the courts below held controlling, is neither applicable to this case nor correct.

In *Evans,* the plaintiff's husband had been killed in a collision in Indiana when the 1961 Chevrolet he was driving was struck broadside by a 1959 Ford travelling 75 miles per hour. The claim there, in effect the counterpart of the claim here, was against the manufacturer of the struck vehicle (here it is against the manufacturer of the striking vehicles), and was that because collisions between automobiles are foreseeable, automobile manufacturers have a duty to design their automobiles so as to protect the occupants from injury or death in collisions. The district court dismissed the complaint in that action for failure to state a claim and the Seventh Circuit affirmed, on the ground that the automobile manufacturer's duty does not require it to make its product safe or safer to engage in collisions, stating:

> "The major question before us is the nature of the duty which an automobile manufacturer owes to users of its products. This presents an issue of law for the Court. *Union Traction Co.* v. *Berry,* 1919, 188 Ind. 514, 520-1, 121 N. E. 655, 657; *Kahn* v. *Chrysler*

Corporation, D. C. S. D., Tex. 1963, 221 F. Supp. 677, 678.

"The defendant concedes that it had a duty to design its automobile to be reasonably fit for the purpose for which it was made, without hidden defects which would make it dangerous to persons so using it.

"* * *

"A manufacturer is not under a duty to make his automobile accident-proof or fool-proof; nor must he render the vehicle 'more' safe where the danger to be avoided is obvious to all. *Campo* v. *Scofield,* 1950, 301 N. Y. 468, 95 N. E. 2d 802, 804. Perhaps it would be desirable to require manufacturers to construct automobiles in which it would be safe to collide but that would be a legislative function, not on aspect of judicial interpretation of existing law. *Campo* v. *Scofield, supra,* 805.

"* * *

"The intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur." (359 F. 2d at 824, 825.)

Both the district court and the court below held that the principles announced in *Evans* were controlling here. 261 F. Supp. at 135; 384 F. 2d at 804.

The court below completely disposed of petitioner's contention that the *Evans* case is not applicable here:

"We are not convinced by the plaintiff's contention that *Evans* is not applicable. The plaintiff here, like the plaintiff in *Evans* sought to impose on the automobile manufacturer a duty to design an automobile incapable of causing injury (or capable of minimizing injury) through foreseeable misuse for a purpose for which the automobile was never supplied." (384 F. 2d 802, at 805.)

There has been no criticism of *Evans* from any court. Quite the contrary, that decision has been expressly fol-

lowed by the Fifth and Sixth Circuits in *General Motors Corporation* v. *Muncy* (5 Cir. 1966), 367 F. 2d 493; and *Krentz* v. *Union Carbide Corporation* (6 Cir. 1966), 365 F. 2d 113. See also *Willis* v. *Chrysler Corp.* (D. C. S. D. Tex. 1967), 264 F. S. 1010, 1011, and *Royal* v. *The Black and Decker Manufacturing Company,* C. C. H. Products Liability Reports, para. 5878 (Nov. 7, 1967).

And *most* important is the inherent soundness of the *Evans* decision and its application in this case by the court below. A contrary decision would have launched the Courts of Indiana, at least, on a journey with no foreseeable end. In fact, although petitioner acknowledges in his statement of questions presented (Petition, p. 3) that this case involves only the application of Indiana law, he invites this Court to undertake the same journey, by arguing that this Court can turn this case into a vehicle for taking "the greatest step forward in promoting automobile safety" (Petition, pp. 6-7).

We do not believe that this specious appeal will cause this Court to ignore the fact that this case is a diversity action in which the sole function of this Court is to determine if Indiana law was properly applied. Nonetheless, the fallaciousness of petitioner's reasoning in this respect demonstrates the basic wisdom of the *Evans* case and the decision of the court below in this case.

In the first place, petitioner is less than candid with this Court when he implies that he seeks only to influence future design, to force automobile manufacturers to "stop designing their automobiles with such unreasonable speed capacity and emphasizing that speed in their advertising." (Petition, p. 6.) Petitioner was struck by an automobile designed prior to 1960. There are millions of already-designed motor vehicles on the road today, which are capable of being driven in excess of 100 miles per hour.

According to petitioner, all of these automobiles are defective.

Thus petitioner does not seek merely the formulation of a design standard for the future. He seeks the imposition of an *ex post facto* standard for millions of automobiles already produced and in daily use on the highways. See the *Cornell Law Quarterly* note on the *Evans* case which finds the court's decision to defer to the legislature "strategically sound" for this reason. 52 *Cornell L. Q.* 444.

Moreover, the standard which petitioner seeks to impose retroactively is really no standard at all. He is not requesting that courts, in defining the automobile manufacturer's duty, determine the maximum safe speed for automobiles. Under his concept that the sole function of the court is to determine whether "some" duty was owed, he is necessarily saying that juries are to be permitted to fix the standard retroactively on a case-by-case basis. In this case the jury will be free to decide retroactively that 115 miles per hour is too fast. In the next case the jury will be free to decide retroactively that 95 miles per hour is too fast; in the next, 80 miles per hour, *ad infinitum*.

It was this motion which prompted the District Court below to observe that:

> "Obviously, if regulation in this area is to come—and we do not say it should not—it should come in the form of an act which would apply a uniform national standard to a highly centralized national industry, and not be hammered out, higgledly-piggledy, on a case to case basis with all of the disparsity which would inevitably result." (261 F. Supp. at 136.)

Petitioner, of course, ignores the plain fact that an automobile can be driven dangerously fast, although within the posted speed limit, with injury and death just as certain to occur. His hindsight notion that he would not have been injured, or would have been less seriously injured, if he

had been hit at 80 miles per hour instead of 115 miles per hour is just so much speculation. All accidents are avoidable by hindsight and speculation, but this is not standard for a manufacturer's liability for negligence.

Neither can petitioner's theories of liability be viewed simply from the standpoint of automobiles and automobile manufacturers. Petitioner obviously believes that the common law should be changed for automobile manufacturers because of the seriousness of the automobile accident problem. But the common law does not have different rules for different manufacturers. It has one rule for all manufacturers, and any suggested change of that rule has got to be viewed from the standpoint of all manufacturers.

If the common law is to be, as petitioner suggests, that an automobile manufacturer is to be held responsible for an accident when he merely fails to make his product so that it cannot be misused, to harm another, then every manufacturer will be subject to the same liability, including the manufacturers of knives and guns who fails to make them so that they cannot be used to harm others. There is not a product that cannot be misused in countless ways to harm others.

In one of the most carefully considered products liability cases of recent years, the Court of Appeals for the District of Columbia said in *Jamieson* v. *Woodward & Lothrop* (D. C. Cir. 1957), 247 F. 2d 23, 26, *cert. den.* 355 U. S. 855:

> "The law does not require that an article be accident proof or incapable of doing harm. It would be totally unreasonable to require that a manufacturer warn or protect against every injury which may ensue from mishap in the use of his product. Almost every physical object can be inherently dangerous or potentially dangerous in a sense. A lead pencil can stab a man to the heart or puncture his jugular vein, and due to that potentiality it is an 'inherently dangerous' object; but, if a person accidentally slips and falls on a pencil in

his pocket, the manufacturer of the pencil is not liable for the injury. He has no obligation to put a safety guard on a lead pencil or to issue a warning with its sale. A tack, a hammer, a pane of glass, a chair, a rug, a rubber band, and myriads of other objects are truly 'inherently dangerous' because they might slip . . . A hammer is not of defective design because it may hurt the user if it slips. A manufacturer cannot manufacture a knife that will not cut or a hammer that will not mash a thumb or a stove that will not burn a finger."

Petitioner's conjecture (Petition, pp. 23-24) as to the intent of Congress in enacting Section 108(c) of the National Traffic and Motor Vehicle Safety Act of 1966 is completely without support in the legislative history of the Act, which is replete with references to the desirability and, in fact, the necessity of imposing one single standard with which all automotive manufacturers would comply. One of the most vocal critics of the American automobile, Professor Jeffrey O'Connell, acknowledges:

> "* * * judicially induced reform would of necessity be episodic and disorganized, dependent upon the fortuitous circumstances of individual lawsuits. * * * The imposition of safety standards on the automobile industry can most likely be achieved better by a consistent application of regulatory standards drawn up by experts and kept current by research, rather than by *ad hoc* decisions of inexpert judges and juries." O'Connell, "Taming the Automobile," 58 N. W. U. L. Rev. 299, 375 (1963).

F. Petitioner Was Not Erroneously Deprived of a Jury Trial.

It is of course basic that petitioner was not deprived of his constitutional right to a jury trial if his complaint was properly dismissed for failure to state a claim upon which relief could be granted.

CONCLUSION.

The opinion of the Court below correctly applied the law of the State of Indiana and neither petitioner's superficial criticism of that opinion nor the imaginary issue injected in the petition to interest the Court would justify further review of this case.

Respectfully submitted,

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